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No. 07 -

IN THE

Supreme Court of the United States

RAJAH BAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Hobbs Act (18 U.S.C. § 1951(a)) prosecution of local robberies that have only a *de minimis* effect on interstate commerce is an unconstitutional exercise of federal power.

PARTIES TO THE PROCEEDING

Petitioner Rajah Baylor was defendant-appellant in the Court of Appeals.

Respondent United States of America was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at --- F.3d --- and is reprinted in the Appendix to the Petition ("App.") at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl.3, empowers Congress to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes."

The Hobbs Act, 18 U.S.C. § 1951(a), makes it unlawful to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion."

STATEMENT OF THE CASE

This petition presents the question whether, consistent with this Court's recent Commerce Clause jurisprudence, the federal government may prosecute under the Hobbs Act, 18 U.S.C. § 1951(a), local, small-scale robberies which have only a *de minimis* effect on interstate commerce. Petitioner Rajah Baylor was arrested by Cleveland police officers after he robbed a Cleveland-area Little Caesar's pizza

restaurant. For his theft of $538, petitioner was convicted of interfering with commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Petitioner was sentenced to approximately five years in prison for his Hobbs Act conviction.

The Sixth Circuit affirmed the conviction, concluding that petitioner's robbery could be prosecuted under the Hobbs Act, even though it had only a *de minimis* effect on interstate commerce. App. 9a. The majority below held that the *de minimis* standard satisfied constitutional requirements because individual instances of robbery could, through repetition, have a substantial effect on interstate commerce. App. 5a. Concurring, Judge Suhrheinrich recognized that he was bound by Sixth Circuit precedent, but expressed concern that those precedents are "inconsistent with the recent Supreme Court precedent, and more fundamentally, the doctrine of federalism." App. 10a (Suhrheinrich, J., concurring).

1. The Hobbs Act makes it a federal crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). Originally enacted as an amendment to the Anti-Racketeering Act of June 18, 1934, Pub. L. No. 73-376, 48 Stat. 979-80 ("the 1934 Act"), the Hobbs Act was a response to this Court's holding in *United States v. Local 807, International Brotherhood of Teamsters*, 315 U.S. 521 (1942), that the extortion of out-of-state truck drivers by members of a New York City truck drivers union fell within an exception to the 1934 Act. *See United States v. Enmons*, 410 U.S.

396, 402-03 (1973); *see also United States v. McFarland*, 311 F.3d 376, 382 & n.14 (5th Cir. 2002) (en banc) (Garwood, J., dissenting from per curiam).

As explained by the House Committee on the Judiciary Report, the Hobbs Act was passed to "eliminate racketeering in relation to interstate commerce, of concern to the Nation as a whole. That statute came under examination of the Supreme Court in *United States v. Local 807* . . . ." H.R. Rep. No. 79-288, at 1-2 (1945). The Report's conclusion emphasized that Congress was concerned about the movement of goods in interstate commerce, explaining that "the Constitution . . . confers on [Congress] the exclusive and unlimite[d] power to regulate interstate commerce" and that "the members of the Constitutional Convention agreed that our Federal Government would be destroyed if barriers should be erected in any way to impede the free flow of interstate commerce." *Id.* at 10. Debate in the House echoed these concerns, and focused almost exclusively on the "interruption of commodity shipments actually moving in interstate commerce, principally agricultural commodities being carried by truck across state lines." *McFarland*, 311 F.3d at 385 (Garwood, J., dissenting from per curiam); *see also id.* at 385-87 & n.19.

2. In December 2005, Kevin Oliver, co-defendant in this case, planned a robbery of the Little Caesar's Pizza where he had worked in Cleveland, Ohio. Pursuant to that plan, petitioner broke into the restaurant just after closing and demanded that an employee open the safe. He then hit the employee with

a gun, and took approximately $538 before running out the back of the store.

Later that evening, Oliver and petitioner were picked up by the police and arrested. During petitioner's two-day trial, the owner of the Little Caesar's, Louis Archer, testified that he only ordered supplies from an in-state distributor, Blue Line Food Service Distribution in Columbus, Ohio. Pet. C.A. Br. at 1, 4-5. Joe Mestrovich of Blue Line Food Service Distribution testified that his company purchased the products for distribution to the individual Little Caesar's pizza stores from businesses out of state and that those products were then distributed from the company's Columbus warehouse. *Id.* at 4. This was the only evidence offered at trial of a connection between the local pizza restaurant and interstate commerce. Petitioner was convicted of interfering with commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and sentenced to 56 months of imprisonment.[1]

3. The Court of Appeals (Griffin, Sutton, Suhrheinrich, JJ.) affirmed petitioner's conviction. App. 9a. The panel began by noting that it had previously "reaffirmed [its pre-*United States v. Lopez*, 514 U.S. 549 (1995)] holdings that the government must prove only that a robbery had a *de minimis* effect on interstate commerce in order to satisfy the jurisdic-

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[1] Petitioner was also convicted of one count of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), for which he was sentenced to 84 months of imprisonment to be served consecutively to the sentence imposed on the Hobbs Act count. That conviction is not at issue here.

tional requirement of the Hobbs Act." App. 4a. The court adopted the Tenth Circuit's reasoning in *United States v. Bolton*, 68 F.3d 396, 398-99 (10th Cir. 1995), concluding that "if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted). The court further explained that it had subsequently reaffirmed the *de minimis* standard following this Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005). Concluding that it was "bound by our prior published opinions," the court held that it "must reject Baylor's challenge to the *de minimis* standard." App. 7a (citing Sixth Cir. R. 206(c); *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002)).

Judge Suhrheinrich concurred. Although he considered himself bound to affirm the conviction because "the majority's decision is consistent with the law of this Circuit," he expressed the view that "those decisions are inconsistent with the recent Supreme Court precedent, and more fundamentally the doctrine of federalism." App. 10a. He explained that under *Lopez*, "regulated activity must substantially affect interstate commerce" to "fall within the scope of the Commerce Clause," and that *Morrison* had "expressly rejected an aggregation theory when regulating non economic activity." App. 10a. Thus, "[b]y continuing to allow a *de minimis* standard for individual violations of the Hobbs Act, [the court was] essentially nullifying the 'substantial effect' test of *Lopez* and *Morrison*." App. 10a-11a.

Judge Suhrheinrich also observed that the consequences of continuing to allow the *de minimis* standard would be significant: "[t]he effect of our Court's rulings is that every local robbery of a business in the United States is a federal crime." App. 11a. In Judge Suhrheinrich's view, this result could not be "what the Founding Fathers intended," and he explained that he had "harbored the hope that the Supreme Court in *Lopez* was seeking to restore a proper state-federal balance that gives actual meaning to the term federalism." App. 11a. He concluded by expressing the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." App. 11a.

REASONS FOR GRANTING THE PETITION

This case presents an important question about the proper scope of federal power: whether the Constitution permits the federal government to prosecute an individual who commits a local robbery which has at most a *de minimis* effect on interstate commerce. The courts of appeals settled upon this *de minimis* standard at a point when the lower courts allowed the federal government virtually unlimited power to regulate. But in *United States v. Lopez*, this Court recognized that Congress' powers under the Commerce Clause, while broad, are not without limit. 514 U.S. 549, 556-57 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608 (2000).

In the years since this Court decided *Lopez* and *Morrison*, there has been considerable confusion in the courts of appeals as they have attempted to apply these cases in the Hobbs Act context, and numerous courts of appeals judges have now called

upon this Court to resolve this confusion. During this time, four different approaches have emerged, producing uncertainty about the meaning of *Lopez* and *Morrison* and how those cases should be applied in the federal criminal context. Indeed, the two competing approaches adopted by the courts of appeals are in fundamental conflict with this Court's decisions in *Lopez* and *Morrison*, disrupting the proper federal-state balance and obliterating, in contravention of this Court's decisions, the distinction between "what is truly national and what is truly local." *See Morrison*, 529 U.S. at 617-18; *see also Lopez*, 514 U.S. at 557. The lower courts' attempts to reconcile their decisions with *Lopez* and *Morrison* reveal only that the continued application of the *de minimis* standard cannot be justified in light of the proper Commerce Clause analysis set out in those cases. Because of the confusion in the lower courts, and because of the conflict between the approaches adopted in the lower courts and this Court's Commerce Clause jurisprudence, this Court's review is warranted. This case presents a good vehicle for addressing the important question presented. This Court should grant review.

I. NUMEROUS COURTS OF APPEALS JUDGES HAVE CALLED UPON THIS COURT TO RESOLVE WHETHER THE *DE MINIMIS* STANDARD FOR HOBBS ACT VIOLATIONS IS CONSISTENT WITH *LOPEZ* AND *MORRISON*

It is well-established that our Constitution "created a Federal Government of limited powers." *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Thus,

while Congress may "regulate [c]ommerce . . . among the several [s]tates," U.S. Const. art. I, § 8, cl.3, there are "outer limits" to its authority to do so, *see United States v. Lopez*, 514 U.S. 549, 556-57 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608 (2000) (Congress' "regulatory authority [under Commerce Clause] is not without effective bounds]"). In *Lopez*, this Court surveyed the history of its jurisprudence under the Commerce Clause and "identified three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate commerce, *i.e.*, "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *see also Gonzales v. Raich*, 545 U.S. 1, 15-19 (2005); *Morrison*, 529 U.S. at 608-09. Turning to the third of those categories, this Court set out the proper analytical framework for determining the constitutionality of statutes intended to regulate conduct that substantially affects interstate commerce. *See Lopez*, 514 U.S. at 559-64. In *Morrison*, this Court reaffirmed *Lopez*'s analytical framework and made clear that "noneconomic, violent criminal conduct" cannot be regulated "based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 608-09, 617.

Despite this Court's guidance, first in *Lopez* and then in *Morrison*, there is considerable discord among judges on the courts of appeals as to how those cases should be applied in the context of con-

stitutional challenges to convictions under the Hobbs Act, and numerous courts of appeals judges have now called upon this Court to address this important question. In the years since *Lopez* was decided, every court of appeals has considered whether the *de minimis* standard remains constitutional following *Lopez*,[2] and in that time, at least four different views have emerged. Indeed, even those judges who have concluded that the *de minimis* standard remains appropriate are divided as to the appropriate analytical framework for assessing challenges to Hobbs Act convictions in light of *Lopez*.

Under one view, articulated most forcefully by eight Fifth Circuit court of appeals judges, application of the *de minimis* standard is in clear conflict with this Court's Commerce Clause jurisprudence and requires repudiation of that court's pre-*Lopez* precedents. *See United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc) (Garwood, J., dissenting from per curiam). In *McFarland*, the Fifth Circuit, by an equally divided en banc court, affirmed the defendant's conviction of four counts of

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[2] *See, e.g.*, *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006); *United States v. Farrish*, 122 F.3d 146 (2d Cir. 1997); *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003); *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003); *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc); *United States v. Davis*, 473 F.3d 680 (6th Cir. 2007); *United States v. Peterson*, 236 F.3d 848 (7th Cir. 2001); *United States v. Dobbs*, 449 F.3d 904 (8th Cir. 2006); *United States v. Atcheson*, 94 F.3d 1237 (9th Cir. 1996); *United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000); *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997).

Hobbs Act robbery for robbing three convenience stores and a liquor store. In one of the robberies, the defendant had stolen "about $50." *Id.* at 377-78. Although the eight judges who voted to affirm the conviction provided no rationale for their decision, eight judges dissented, forcefully arguing that the Hobbs Act cannot be constitutionally applied to the robbery of local retail stores. Under their view, such activities are not the types of commercial activities properly regulated under the Commerce Clause. *Id.* at 396 ("'[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory'" (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)). To hold otherwise, the dissenters concluded, "would, without adequate justification, bring within the scope of the Commerce Clause the proscription of local violent (and other) crimes not constituting the regulation of commercial activity, crimes prototypical of those that historically have been within the reserved police power of the states, contrary to the principle that the Commerce Clause is limited to matters that are truly national rather than truly local." *Id.* at 409-10 (emphasis omitted).

Similarly, in *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997), Judge Sentelle dissented from his court's continued application of the *de minimis* standard. He explained that "[t]he Supreme Court's majority opinion in *Lopez*, especially in light of the concurring language of three justices"

led him "to believe that the United States' broad interpretation of the Hobbs Act robbery statute is directing us toward constitutionally dangerous ground." *Id.* at 1476. He further explained that a "'relatively trivial effect [if any] on commerce' should not be used as an excuse for the broad federalization of an otherwise state-governed crime." *Id.*

Under a second view, articulated by the court below and the Tenth Circuit, the *de minimis* standard remains constitutional because "if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted); *see also United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (considering whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce"). Under this view, the fact that the robbery of a local retail store is neither "economic" nor "commercial" in the sense that this Court has used those terms is immaterial to the analysis of whether the activity's effect on interstate commerce can be regulated.

Under a third view, the presence of a jurisdictional element in the Hobbs Act is critical, rendering *Lopez* and its substantial effects test inapplicable. *See, e.g.*, *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996) ("Be-

cause the Hobbs Act is concerned solely with *inter*state, rather than *intra*state, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable."). Thus, under this view, it is immaterial whether the activity, in aggregate, has a substantial effect on interstate commerce: Congress can change the required showing by inclusion of a jurisdictional element.

And, under a fourth view, the *de minimis* standard may well be unconstitutional, but circuit precedent forecloses abandoning it until this Court applies its decisions in *Lopez* and *Morrison* in the Hobbs Act context. Judge Torruella, for example, concurred in affirming the conviction of a robbery of an individual in his private residence even though he believed that the majority's "interpretation of the Hobbs Act . . . extends Congress' power to regulate interstate commerce beyond what is authorized by the Constitution." *United States v. Jimenez-Torres*, 435 F.3d 3, 13 (1st Cir. 2006) (Torruella, J., concurring). He explained his decision to concur: "[B]ecause precedent binds me until such time as the Supreme Court puts an end to the fictions that allow the apparently limitless aggrandizement of federal power into areas reserved to the states by the Constitution, I have no choice but to concur in the affirmance of [defendant's] conviction." *Id.* at 15; *cf. United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002) ("[The defendant] argues that *Lopez* effected far more of a sea change in the Supreme Court's Commerce Clause jurisprudence than we have been willing to acknowledge. . . . We are bound by the ample Seventh Circuit precedent on this point. If, indeed, *Lo-*

pez's rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold.").

Similarly, in this case, Judge Suhrheinrich concurred because "the majority's decision is consistent with the law of this Circuit." App. 10a. He further explained, however, that this result conflicted with *Lopez* and *Morrison* and could not be "what the Founding Fathers intended." App. 11a. He thus expressed the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." App. 11a.

Thus, a decade after this Court decided *Lopez*, there is fundamental disagreement among the courts of appeals as to how the test this Court set forth in *Lopez* should be applied in the Hobbs Act context. Because resolution of this issue is necessary, this Court's review is warranted.

II. THE *DE MINIMIS* STANDARD IS IN DIRECT CONFLICT WITH *LOPEZ* AND *MORRISON*

Judge Suhrheinrich expressed the hope that this Court would review the vitality of the *de minimis* standard post-*Lopez* because, in his view, that standard is in tension with both the federalism envisioned by the Founding Fathers and this Court's decisions in *Lopez* and *Morrison*. *See* App. 11a. Indeed, in those cases, this Court recognized that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618. Allowing Congress to intrude into

this sphere of state sovereignty disturbs "one of the few principles that has been consistent since the Clause was adopted," that is, that there must be a "distinction between what is truly national and what is truly local." *Id.* at 617. The *de minimis* standard is in tension with this Court's decisions in *Lopez* and *Morrison* because it subjects virtually all theft to federal prosecution, blurring the line between the "truly national" and the "truly local." The courts of appeals' efforts to reconcile this tension simply make clear that the *de minimis* standard cannot survive the analytical framework set out in *Lopez*.

A. Under *Lopez* and *Morrison*, It Is Improper To Disrupt the Federal Balance By Making the Most Trivial and Local of Thefts Subject to Federal Prosecution.

In *Lopez*, this Court explained that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. As this Court previously noted, in the context of rejecting the proposition that the Hobbs Act was intended to confer upon the federal government the authority to "polic[e] the orderly conduct of strikes," *Enmons*, 410 U.S. at 411, there is no indication in the Act's legislative history that Congress intended to encroach upon criminal prosecutions that had historically been the province of the states: "[n]either the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work . . . such an unprecedented incursion into the criminal jurisdiction of the

States," *id.* Yet the effect of the decision of the court below is to do exactly that: it literally makes a "federal case" out of the most trivial of crimes, the sort of crimes which "would normally be a mainstay of the docket of the local district attorney," *Harrington*, 108 F.3d at 1474 (Sentelle, J., dissenting).

Here, petitioner stole a few hundred dollars from the pizza restaurant at which his co-defendant happened to work. While petitioner's criminal conduct surely should be punished (and presumably would have been prosecuted in state court had the federal government not intervened), it hardly implicates core concerns of the federal government. But once the fact that the victim sometimes buys goods from out of state is sufficient to establish an effect on interstate commerce and thus federal jurisdiction, the federal government's power to prosecute crime is virtually without limit. As Judge Sentelle has pointed out,

> [U]nder [this theory], there is no armed robbery of a commercial victim not covered by the Hobbs Act. There is no corner grocery in Kansas that does not stock orange juice from Florida or California; none in Florida or California that does not stock salt from some other state. Under the government's theory of this case, Congress, in passing the Hobbs Act, intended to federalize the robbery of every Mom and Pop restaurant that buys coffee, spices, or fruit from out of state. That is all of them.

Id. at 1473. Indeed, under the *de minimis* standard, even the robbery of private individuals can be subjected to federal prosecution under the Hobbs Act. *See, e.g.*, *United States v. Taylor*, 176 F.3d 331, 339 (6th Cir. 1999) (rejecting argument that "Hobbs Act is unconstitutional insofar as it is applied to the robbery of a private citizen, or burglary of a private residence").

As Judge Torruella explained in his concurrence in *Jimenez-Torres*, the crime in that case was a fundamentally local crime: "[the defendant] and five other cohorts were 'looking for houses to rob'" and randomly chose one. *Jimenez-Torres*, 435 F.3d at 13 (Torruella, J., concurring). However, the federal government, "in its zeal to make this unfortunate incident into something it is not—criminal activity implicating core federal interests," introduced into evidence at trial various facts about the victim's connection to a commercial establishment, facts that had no bearing on the actual crime. "Upon [an] exiguous thread of irrelevant evidence, the government casts a net that, if allowed to set without challenge, would elbow out large chunks of traditional state criminal jurisdiction and federalize such crimes." *Id.* at 14. "At the rate we are going," Judge Torruella warned, "perhaps the day will come when the federal government will see fit to prosecute the robbery of a child's roadside lemonade stand because the lemons came from California, the sugar was refined in Philadelphia, and the paper cups were manufactured in China." *Id.* at 15.

By bringing "within the scope of the Commerce Clause the proscription of local violent (and other)

crimes not constituting the regulation of commercial activity, crimes prototypical of those that historically have been within the reserved police power of the states," *McFarland*, 311 F.3d at 409-10 (Garwood, J., dissenting from per curiam) (emphasis omitted), the Hobbs Act threatens to "displace . . . policy choice[s] made by the State[s]," *Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring).

This broad federal police power, depriving the states of their traditional authority in the criminal realm, is precisely what *Lopez* and *Morrison* prohibit. By upholding the *de minimis* standard, the courts of appeals have embarked upon a path that threatens to radically change the "constitutional dogma that establishes that, other than by constitutional exception, 'the suppression of violent crime and vindication of its victims' is a power that 'the Founders denied the National Government and reposed in the States.'" *Jimenez-Torres*, 435 F.3d at 14 (Torruella, J., concurring). This radical disruption of the traditional line between federal and state power is in sharp tension with this Court's decisions in *Lopez* and *Morrison*. The courts of appeals' efforts to reconcile the *de minimis* standard with these cases make clear that that standard is incompatible with the analytical framework they establish.

B. Under *Lopez* and *Morrison*, Robbery Is a Non-Economic Activity That Cannot Be Aggregated To Establish the Required Substantial Effect on Interstate Commerce.

The majority below concluded that only a *de*

minimis effect on interstate commerce was necessary to support federal prosecution, holding that "if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted). Likewise, in the case on which the panel below relied, the Tenth Circuit identified the question as simply whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce." *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995). Both the panel below and the Tenth Circuit, however, failed to consider whether the regulated activity was commercial. The Tenth Circuit thus distinguished *Lopez* solely on the ground that "[u]nlike possession of a firearm in a school zone, . . . robbery and extortion are activities that through repetition can substantially affect interstate commerce." *Id.*

As this Court's recent Commerce Clause cases establish, only activity that is economic or commercial in nature may be aggregated to determine whether there is a substantial effect on interstate commerce sufficient to support regulation under the Commerce Clause. *See, e.g.*, *Lopez*, 514 U.S. at 560 ("[w]here *economic* activity substantially affects interstate commerce, legislation regarding that activity will be sustained" (emphasis added)). Distinguishing the statute at issue in *Lopez* from the statute that was upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942), under an aggregation theory, the Court explained that *Wickard* "involved economic activity in a way

that the possession of a gun in a school zone does not," *Lopez*, 514 U.S. at 560.

In *Morrison*, too, this Court noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis omitted); *see also id.* at 617 (Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). And, most recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court again emphasized the centrality of the economic nature of the activity to proper Commerce Clause analysis, distinguishing the Controlled Substances Act from the statutes at issue in *Lopez* and *Morrison* on the ground that "the activities regulated by the CSA are quintessentially economic." *Id.* at 25; *see also id.* at 35-36 (Scalia, J., concurring) ("In *Lopez* and *Morrison*, the Court . . . rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.").

These cases also make clear that the "economic" activity that may be regulated under the Commerce Clause is that activity that can be "properly described as 'commercial' or 'economic' *in the same general sense* as 'commercial.'" *See McFarland*, 311 F.3d at 396 (Garwood, J., dissenting from per curiam). In *Lopez*, for example, this Court noted that "Congress has authority under the *Commerce Clause* to regulate numerous *commercial* activities that substantially affect interstate commerce," and recognized

that the "determination whether an intrastate activity is *commercial* or *noncommercial*" was a central question in Commerce Clause analysis. 514 U.S. at 565-66 (emphasis added); *see also id.* at 583 (Kennedy, J., concurring) (congressional regulation inappropriate when it is of an "activity beyond the realm of commerce in the ordinary and usual sense of that term"); *McFarland*, 311 F.3d at 396 (Garwood, J., dissenting from per curiam) (*Lopez* and *Morrison* "appear to use the terms ['commercial' and 'economic'] synonymously"). And in *United States v. Robertson*, 514 U.S. 669 (1995), this Court again recognized that "[t]he 'affecting commerce' test was developed . . . to define the extent of Congress's power over purely *intra*state *commercial* activities that nonetheless have substantial *inter*state effects." *Id.* at 671 (emphasis added); *United States v. Bishop*, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J., dissenting) ("[i]f the intrastate activity is commercial, the 'substantial effects' jurisprudence applies . . . otherwise, the doctrine is inapplicable and affords Congress no basis for regulation").

Robbery of a few hundred dollars is not "commercial" in the "ordinary and usual sense of that term." *See, e.g.*, *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (Gun Free School Zones Act "regulat[ed] an activity beyond the realm of commerce in the ordinary and usual sense of that term"). The term "commerce" is used to refer to "[b]uying and selling; the exchange of merchandise or services, esp. on a large scale." 1 New Shorter Oxford English Dictionary (1993); *see also* Webster's 3rd New International Dictionary (1993) ("the exchange or buying and sell-

ing of commodities, esp. on a large scale and involving transportation from place to place"). As was noted in *McFarland*, "[r]obbery does have an economic effect. But so, too, do not only all thefts of any kind from any victim but also, for example, virtually all criminal homicides." 311 F.3d at 396-97 (Garwood, J., dissenting from per curiam). But that it has an "economic effect" does not necessarily mean that it also has an effect on interstate commerce; theft, for example, even from a business that buys goods from out of state, may have no effect on interstate commerce if the money stolen is immediately used to purchase other goods that have also moved in interstate commerce (as most have). Concluding that robbery has an effect on interstate commerce (as opposed to an effect on the entity or individual robbed) requires assumptions about how the money would have been used by the true owner, as well as how it will be used by the person who stole it.

And in *Morrison*, this Court rejected reliance on such assumptions and attenuated chains of causation in establishing an effect on interstate commerce, recognizing that petitioners' "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce. . . . would allow Congress to regulate *any* crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." 529 U.S. at 615; *see also Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the

commerce power may reach so far"). Thus, this Court expressly "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617; *see also McFarland*, 311 F.3d at 397 (Garwood, J., dissenting from per curiam) ("*Morrison* rejects the notion that Congress may regulate a crime simply because 'the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.'").

Nothing in *Gonzales* alters the conclusion that robbery is not within the class of activity that may be aggregated for purposes of Commerce Clause analysis. Although *Gonzales* did recognize that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale," such regulation is permissible only when the "failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." 545 U.S. 1, 18 (2005). As Justice Scalia explained in his concurrence, while Congress' power "'to make . . . regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct." *Id.* at 37 (Scalia, J., concurring). Thus, in *Gonzales*, regulation of the purely local growth and consumption of marijuana was proper because "[t]he regulation of an intrastate activity [was] essential to a comprehensive regulation of interstate commerce." *Id.* at 31; *cf. Lopez*, 514 U.S. at 574 (Kennedy, J.,

concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").[3] Here, however, there is no comprehensive regulatory scheme comparable to the CSA. *See, e.g.*, *Harrington*, 108 F.3d at 1476 (Sentelle, J., dissenting) ("Congress did not undertake a general regulatory scheme of armed robberies.").

Accordingly, this Court's review is necessary to

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[3] Indeed, the majority in *Gonzales* repeatedly noted that failure to regulate the intrastate growth of marijuana would meaningfully undercut the regulation of the interstate market. *See, e.g.*, *id.* at 18 ("Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."); *id.* at 19 ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions"); *id.* ("parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market"); *id.* ("regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity"); *id.* at 22 ("we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA"); *id.* at 26 ("CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.").

clarify the class of activity that can properly be aggregated to establish the required "substantial effect" on interstate commerce, and to establish that "robbery" is not "commercial" in the sense that makes aggregation appropriate for the purposes of Commerce Clause analysis.

C. Under *Lopez* and *Morrison*, the Existence of a Jurisdictional Element Does Not Lessen the Showing Required To Establish a Substantial Effect on Interstate Commerce.

Although the panel below relied upon an aggregation theory, several other courts of appeals appear to have concluded that local robberies can be federally prosecuted primarily (if not solely) because the Hobbs Act contains a jurisdictional element. *See, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) ("Congress' inclusion of a jurisdictional element in the Hobbs Act addresses the *Lopez* Court's constitutional concern that congressional authority under the Commerce Clause not become a 'general police power of the sort retained by the States'" (emphasis omitted)); *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002) ("As the Hobbs Act requires a particularized jurisdictional showing, we find Morrison does not affect our requirement that 'the Government need only show a "minimal" effect on interstate commerce' to support Hobbs Act jurisdiction."); *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v.*

Atcheson, 94 F.3d 1237, 1242 (9th Cir. 2006) ("Because the Hobbs Act is concerned solely with *interstate*, rather than *intrastate*, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable."); *Harrington*, 108 F.3d at 1465 (*Lopez*, in recognizing the "central role that a jurisdictional element can play in the valid application of a federal criminal statute, clearly does not assume that a 'substantial' effect on interstate commerce need be shown in such a setting").

But the jurisdictional element, while establishing that the statute was enacted pursuant to Congress' Commerce Clause power and thus regulates only those instances that have an effect on interstate commerce, says nothing about *how large an effect* is required to satisfy constitutional requirements. *See Bishop*, 66 F.3d at 594 (Becker, J., dissenting) ("a jurisdictional element functions only to limit the regulation to interstate activity *or* to ensure that the intrastate activity which is regulated satisfies one of the three tests of congressional power"). As the Court explained in *Lopez*, the purpose of a jurisdictional element is to "ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." 514 U.S. at 561. *Lopez* nowhere suggested that the mere existence of the jurisdictional element is itself reason to hold that all convictions under the statute are constitutional even in the absence of that case-by-case inquiry.

Nonetheless, as the dissenters in *McFarland* observed, "some of our sister circuits have relied on [the existence of a jurisdictional element] (among other considerations) in holding that *Lopez* and *Mor-*

rison are either largely inapplicable to Hobbs Act cases, or do not require that a substantial effect on interstate commerce be shown in Hobbs Act prosecutions falling under *Lopez* category three." 311 F.3d at 394 (Garwood, J., dissenting from per curiam).[4] But, contrary to these lower court decisions, this Court left no doubt in *Lopez* that an intrastate activity must "substantially affect" interstate commerce to be subject to regulation pursuant to the Commerce Clause. As this Court explained, "our case law ha[d] not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." 514 U.S. at 559. It then resolved the confusion: "We conclude, consistent with the great weight of our case law, that the

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[4] *See* Andrew Weis, Note, *Commerce-Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1454 (1995) ("[t]he lower courts appear to assume that the mere presence of a jurisdictional element . . . . automatically renders a statute constitutional"); Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1680 (2002) ("Because courts do not subject statutes containing a jurisdictional element to the stricter 'substantial effects' standard of review, Congress's Commerce Clause power remains essentially unchanged after *Lopez* and *Morrison*."); George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 Ohio St. L.J. 947, 989 (2005) ("it was easy for the lower courts to conclude either that the mere presence of a jurisdictional element saved a statute from possible invalidity, or to construe statutes using this technique in a way that made satisfying the requirements of the elements a simple task for prosecutors").

proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559; *see also id.* ("we have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity *substantially affected* interstate commerce"); *id.* at 560 ("[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"). The simple existence of a jurisdictional element does not change that constitutional requirement.

Thus, following this Court's clear holding in *Lopez*, there is no basis for concluding that Congress has "the power to provide for a *lesser* relation to interstate commerce . . . simply by including a jurisdictional provision." *McFarland*, 311 F.3d at 394-95 (Garwood, J., dissenting from per curiam); *see also Morrison*, 529 U.S. at 616 ("[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace"). Otherwise, Congress could bring under federal control any intrastate activity that has a *de minimis* effect on interstate commerce simply by including a jurisdictional element in the statute. *See Lopez*, 514 U.S. at 557 (internal quotation marks omitted); Weis, *supra*, at 1456 ("[u]nder the 'logic' of [lower courts'] reading, the *Lopez* Court could have upheld § 922(q) if Congress had simply inserted a jurisdictional element into its text"); *cf. Bishop*, 66 F.3d at 593 (Becker, J., dissenting) ("[the majority's] reasoning supports the government's contention that *Lopez* would have been decided differently had § 922(*q*) . . . simply contained a requirement that the gun had at

some point been transported in interstate commerce"); *id.* at 596 ("majority's holding effectively renders the Supreme Court's three-part Commerce Clause analysis superfluous, and permits Congress, through the inclusion of a meaningless interstate commerce provision, to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States'" (emphasis omitted)).

Accordingly, this Court's review is warranted to clarify that Congress may not expand its own power under the Commerce Clause simply by including a jurisdictional element in statutes enacted under the Commerce Clause.

III. THIS CASE PRESENTS A GOOD VEHICLE FOR ADDRESSING THIS RECURRING AND IMPORTANT ISSUE

Aside from the confusion in the courts of appeals and the tension between the decision below and this Court's Commerce Clause jurisprudence, review is also warranted because the factual scenario raising the question at issue is recurring. As the cases discussed above indicate, the federal government repeatedly prosecutes individuals whose criminal activity has, at best, a *de minimis* effect on interstate commerce. And the confusion about the proper application of *Lopez* that is evident in the Hobbs Act context is likely to infect other federal criminal statutes as well. *See, e.g.*, *Bishop*, 66 F.3d at 591 (Becker, J., dissenting) ("the majority views *Lopez* as either a narrow decision or something of a 'sport.' . . . I view *Lopez* as a beacon that we must follow, and the direction in which the beacon points compels my

vote to invalidate the carjacking statute as beyond the broad reach of Congress's Commerce Clause power"). Moreover, because the courts of appeals have all weighed in on this question, and there is internal division in at least four circuits, there are lengthy opinions that articulate all the various competing arguments. There is thus no need to wait for additional appellate consideration of the question. *See infra* at 7 & n.2.

Moreover, this case is an ideal vehicle to clarify the proper application of *Lopez* and *Morrison* in the federal criminal context. This case squarely presents the question because the evidence that petitioner's robbery of a few hundred dollars had an effect on interstate commerce is *de minimis* (at best). Indeed, the pizza restaurant which petitioner robbed does not even buy goods from out of state; to the contrary, the restaurant's owner testified that the only place from which he orders supplies is a food service distributor in Columbus, Ohio. Pet. C.A. Br. at 4. The claimed connection to interstate commerce is the Columbus distributor's purchase of its supplies from out of state. *Id.* Only under the *de minimis* standard could such a claimed connection possibly pass constitutional muster. And, this question, *i.e.*, whether the *de minimis* standard survives *Lopez* and *Morrison*, was also squarely presented below, *id.* at 7-11, so there is no concern about waiver. And, finally, there are no other legal issues that could complicate the analysis. This case presents an excellent vehicle for the Court to use to heed Judge Suhrheinrich's call that it "consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*"

and thereby restore clarity to the proper meaning of the Commerce Clause in the federal criminal context.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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May 22, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAJAH BAYLOR,
Defendant-Appellant.
No. 07-3002

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 06-00168 - James S. Gwin, District Judge.

Submitted: February 7, 2008

Decided and Filed: February 26, 2008

Before: SUHRHEINRICH, SUTTON, and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: James M. Campbell, Akron, Ohio, for Appellant. Duncan T. Brown, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

GRIFFIN, J., delivered the opinion of the court, in which SUTTON, J., joined. SUHRHEINRICH, J. (p. 5), delivered a separate concurring opinion.

OPINION

GRIFFIN, Circuit Judge. Following a jury trial in the United States District Court for the Northern District of Ohio, Rajah Baylor was convicted on one count of interfering with commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and one count of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Baylor was subsequently sentenced to a term of 140 months of imprisonment. He now appeals his convictions, arguing that the requirement of a *de minimis* effect on interstate commerce under the Hobbs Act is unconstitutional in light of the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000). Baylor argues further that, even assuming that the *de minimis* standard is appropriate, the government failed to show that his activity had such an effect on interstate commerce. Finding each of Baylor's arguments to be devoid of merit, we affirm his convictions.

I.

On the evening of December 21, 2005, Little Caesar's manager Tina Martin was in the process of closing a Cleveland-area location of the chain pizza restaurant when a brick, thrown from the outside, shattered the glass of the front door. A man dressed in all black, with a hooded sweatshirt covering the top of his head and a mask covering his face, stepped forward and pointed a .38 revolver at Martin, demanding that she open the store's register. The man struck Martin on the head and left with $538.

Cleveland police officers later pulled over a vehicle driven by Baylor's accomplice, Kevin Oliver, and arrested Baylor and Oliver, finding a gun, masks, and gloves on the floorboard of the vehicle. The police returned the suspects to the Little Caesar's restaurant, where Martin identified Baylor as her assailant. Following a two-day trial, a jury convicted Baylor of interfering with commerce by robbery (Count One), in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and of using a firearm in relation to a crime of violence (Count Two), in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The district court then sentenced Baylor to a term of 56 months of imprisonment on Count One and 84 months on Count Two, to be served consecutively, for a total term of 140 months of imprisonment.

II.

Baylor argues that in order to satisfy the jurisdictional element of the Hobbs Act, his activity must have had more than a *de minimis* effect on interstate commerce. Accordingly, Baylor contends that our prior cases interpreting the Hobbs Act, which have held that a *de mimimis* effect on interstate commerce is sufficient to meet constitutional requirements, should be re-examined in light of the Supreme Court's decision in *Morrison*. In *Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act, holding that it did not regulate activity that substantially affected interstate commerce. 529 U.S. at 613. Five years earlier, in *United States v. Lopez*, 514 U. S. 549 (1995), the Court held that Congress's enactment of the Gun-Free School Zones Act of 1990 exceeded the scope of its authority under the

Commerce Clause, in that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *Lopez*, 514 U.S. at 567. *See also United States v. Dupree*, 323 F.3d 480, 485 n.1 (6th Cir. 2003) (summarizing the holdings of *Lopez* and *Morrison*).

We review Baylor's argument de novo because it raises a question of law. *United States v. Smith*, 182 F.3d 452, 455 (6th Cir. 1999).

The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion...shall be fined ... or imprisoned ...." 18 U.S.C. § 1951(a). In *Smith*, we reaffirmed our pre-*Lopez* holdings that the government must prove only that a robbery had a *de minimis* effect on interstate commerce in order to satisfy the jurisdictional requirement of the Hobbs Act. Surveying the weight of authority from our sister circuits, we observed that:

> All of the other circuits that have considered the issue have held that the *de minimis* standard for Hobbs Act charges survived *Lopez*, although the Fifth Circuit has recently granted a rehearing on this issue. *See United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997); *United States v. Alfonso*, 143 F.3d 772, 775 (2d Cir. 1998); *United States v. Farrish*, 122 F.3d 146, 147 (2d Cir. 1997); *United States v. Hickman*, 151 F.3d 446, 456 (5th Cir. 1998), *reh'g granted and op. vacated*, 165 F.3d 1020 (5th Cir. 1999), [*affirmed by* 179

F.3d 230 (5th Cir. 1999) (en banc)]; *United States v. Miles*, 122 F.3d 235 (5th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205 (5th Cir. 1997), *cert. denied*, 522 U.S. 1139 (1998); *United States v. Nelson*, 137 F.3d 1094, 1102 (9th Cir. 1998); *United States v. Woodruff*, 122 F.3d 1185 (9th Cir. 1997); *United States v. Beydler*, 120 F.3d 985, 987 (9th Cir. 1997); *United States v. Nguyen*, 155 F.3d 1219, 1224 (10th Cir. 1998); *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 398-99 (10th Cir. 1995); *United States v. Paredes*, 139 F.3d 840 (11th Cir. 1998) (Wellingford, J., sitting by designation); *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997).

Smith, 182 F.3d at 456. We found persuasive the Tenth Circuit's reasoning in *Bolton* that in *Lopez*, the Supreme Court "recognized that if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence," *id.* (quoting *Bolton*, 68 F.3d at 399) (internal citation and quotation omitted), and held that the "*de minimis* standard for the interstate commerce effects of individual Hobbs Act violations survived *Lopez*." *Smith*, 182 F.3d at 456.

Four years later, in *Dupree*, we addressed the same argument that Baylor now raises - that *Morrison* requires the government to prove more than a *de minimis* effect on interstate commerce under the Hobbs Act. *Dupree*, 323 F.3d at 484-85. We rejected that claim, reaffirming our prior holding

in *Smith* that "the traditional *de minimus* standard for Hobbs Act violations" was appropriate following *Lopez* and *Morrison*, so that "'if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimus* character of individual instances arising under the statute is of no consequence.'" *Dupree*, 323 F.3d at 485 (quoting *Smith*, 182 F.3d at 456).

Most recently, we considered the *de minimis* standard's applicability to the Hobbs Act in *United States v. Davis*, 473 F.3d 680, 681 (6th Cir. 2007). Specifically, in *Davis*, we rejected the defendant's argument that the *de minimis* standard is no longer applicable to the Hobbs Act after the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). *Davis*, 473 F.3d at 682. As we explained:

> There is no reading of *Raich* that supports Davis's contention that this Court cannot continue to apply the *de minimis* standard to Hobbs Act cases, where, as here, the extortion is directed at a business. The Hobbs Act, like the [Controlled Substances Act at issue in *Raich*], regulates activities, which, in the aggregate, have a substantial effect on interstate commerce. *See United States v. Bolton*, 68 F.3d 369, 399 (10th Cir. 1995) ("In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce.") (citing H.R. Rep. No. 238, 79th Cong., 1st Sess., (1945), *reprinted in* 1946 U.S.C.C.A.N. 1360, 1370); *see also* [*United States v.*] *Wang*,

> 222 F.3d [234] at 238 [(6th Cir. 2000)] ("*Lopez* did not require realignment of the Hobbs Act's jurisdictional nexus because individual instances arising under the statute could, through repetition, have a substantial effect on interstate commerce.") (citing *Smith*, 182 F.3d at 456). Therefore, *Raich* permits, rather than restricts, the continued application of the *de minimis* standard where the Hobbs Act offense is directed at a business.

Davis, 473 F.3d at 683. We are bound by our prior published opinions in *Smith*, *Dupree*, and *Davis*, and must reject Baylor's challenge to the *de minimis* standard. *See* Sixth Cir. R. 206(c); *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002).

Finally, we note that since *Smith*, which was published prior to *Morrison*, our sister circuits have continued to apply the *de minimis* standard to the interstate commerce nexus under the Hobbs Act in the wake of *Morrison*. *See United States v. Griffin*, 493 F.3d 856, 861 (7th Cir. 2007); *United States v. Nascimento*, 491 F.3d 25, 37 n.3 (1st Cir. 2007); *United States v. Boyd*, 480 F.3d 1178, 1179 (9th Cir. 2007); *United States v. Davila*, 461 F.3d 298, 306-07 (2d Cir. 2006); *United States v. Foster*, 443 F.3d 978, 983 n.3 (8th Cir. 2006); *United States v. Urban*, 404 F.3d 754, 766 (3d Cir. 2005); *United States v. McCormack*, 371 F.3d 22, 28 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1098 (2005); *United States v. Malone*, 222 F.3d 1286, 1294-95 (10th Cir. 2000). It appears that the Fifth Circuit is divided as to whether the aggregation principle may be applied to allow Hobbs Act convictions where the impact on interstate commerce of individual robberies is

minimal. See *United States v. McFarland*, 311 F.3d 376, 409-10 (5th Cir. 2002) (en banc) (dividing equally on aggregation principle, and therefore affirming defendant's conviction).

III.

Although he does not identify this claim in his brief's "Issues Presented For Review," Baylor also argues that the government did not offer sufficient evidence at trial to satisfy the *de minimis* standard, Federal Rule of Appellate Procedure 28(a) requires the appellant's brief to contain, *inter alia*, "a statement of the issues presented far review...." *See also, e.g., United States v. Winkle*, 477 F.3d 407, 416 n.4 (6th Cir. 2007); *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003). Baylor's brief on appeal identified only a single issue for review. "Whether the *de minimis* threshold is constitutionally sufficient to fulfill the jurisdictional element of the Hobbs Act?"

Assuming, without deciding, that Baylor has raised this issue properly for our review, his argument is plainly without merit. At trial, the government offered the testimony of Joe Mestrovich, the senior director of logistics and transportation services for Blue Line Food Service Distribution ("Blue Line"). Mestrovich testified that Blue Line distributes food products for Little Caesar's restaurants, including the Cleveland location that was robbed by Baylor. He testified further that the food products (cheeses, flours, sauces) traveled through interstate commerce to the Blue Line warehouse in Columbus, Ohio, before they were shipped to the Little Caesar's restaurant that Baylor

robbed. For example, Mestrovich stated that the flour used by the Cleveland Little Caesar's restaurant originated in Minnesota, the sauce from California, and the cheese from Wisconsin. This testimony alone is sufficient to satisfy the *de minimis* standard. *See United States v. Watkins*, 509 F.3d 277, 281 (6th Cir. 2007) (holding that *de minimis* standard is satisfied where defendant robbed check-cashing business that drew checks on nationwide banks); *Davis*, 473 F.3d at 684 (finding *de minimis* standard satisfied by extortion of a bar that purchased alcohol that had traveled in interstate commerce); *United States v. Brown*, 959 F.2d 63, 68 (6th Cir. 1992) (holding that *de minimis* standard was satisfied where defendant attempted to rob a bar that purchased alcohol that had traveled in interstate commerce).

IV.

For the reasons stated, we affirm Baylor's convictions.

CONCURRENCE

SUHRHEINRICH, Circuit Judge, concurring. I concur because the majority's decision is consistent with the law of this Circuit and most other circuits, and is thus correct. However, I think those decisions are inconsistent with the recent Supreme Court precedent, and more fundamentally, the doctrine of federalism.

In *United States v. Lopez*, the Supreme Court held that to fall within the scope of the Commerce Clause, the regulated activity must substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1985) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). In *United States v. Morrison*, the Supreme Court expressly rejected an aggregation theory when regulating non economic activity.

> The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

United States v. Morrison, 529 U.S. 598, 617 (2000) (citations omitted). By continuing to allow a *de minimis* standard for individual violations of the Hobbs Act, we are essentially nullifying the

"substantial effect" test of *Lopez* and *Morrison*. *See United States v. Dupree*, 323 F.3d 480, 485 (6th Cir. 2000) (holding that "the traditional *de minimis* standard for Hobbs Act violations survived *Lopez*").[1]

The effect of our Court s rulings is that every local robbery of a business in the United States is a federal crime. I acknowledge that the Supreme Court has held that Congress intended to include within the scope of the Hobbs Act conduct that was already punishable under the state robbery and extortion statutes. *See United States v. Culbert*, 435 U.S. 371, 379-80 (1978). However, I cannot believe that this is what the Founding Fathers intended. Moreover, I have harbored the hope that the Supreme Court in *Lopez* was seeking to restore a proper state-federal balance that gives actual meaning to the term federalism. I also hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*.

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[1] Notably, *United States v. Dupree* never directly addressed the holding from *Morrison*, but rather found it sufficient to rely on *United States v. Smith*, 182 F.3d 452 (6th Cir. 1999), which was decided after *Lopez* but before *Morrison*.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	
RAJAH BAYLOR	Case Number: 1:06CR00168-002
	USM Number: 30614-160
	James Campbell Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) __ which was accepted by the court.
[x] was found guilty on count(s) 1 and 2 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense
18 USC Sec. 1951(a)	Interference with Commerce by Robbery
18 USC Sec. 924(c)(1)(A)(ii)	Use of Firearm in Relation to Crime of Violence

Offense Ended	Count
12/21/05	1
12/21/05	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) __.
[ ] Count(s) __ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in the defendant's economic circumstances.

12/20/06
Date of Imposition of Judgment

s/ James S. Gwin
Signature of Judicial Officer

JAMES S. GWIN, United States District Judge
Name & Title of Judicial Officer

12/20/06
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 56 months on Count 1 and 84 months on Count 2 to be served consecutively with credit for time served.

The defendant shall participate in the Bureau of Prison's Inmate Financial Responsibility Program.

[x] The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in the following facility: FCI McKean.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at __ on __.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before 2:00 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10)the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11)the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12)the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13)as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

None.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200	$	$450

[ ] The determination of restitution is deferred until. An amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

[x] The defendant must make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	*Total Loss
Louis Achkar	$450.00
TOTALS:	$450.00

Restitution Ordered	Priority or Percentage
$450.00	100
$450.00	100

[ ] Restitution amount ordered pursuant to plea agreement $_____.

[ ] The defendant must pay interest on restitution and a fine of more than $2500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine [ ] restitution.

[ ] The interest requirement for the [] fine [] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due
[ ] not later than or
[ ] in accordance with [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C [ ] D, or [ ] F below); or

C [ ] Payment in equal installments of $ over a period of, to commence days after the date of this judgment; or

D [ ] Payment in equal installments of $ over a period of, to commence days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

[x] A special assessment of $200 and restitution in the amount of $450 are due in full immediately as to count(s) 1 and 2 of the Indictment. While incarcerated defendant shall pay 25% of his gross monthly income through the Federal Bureau of Prisons Inmate Financial Responsibility Program towards restitution. Any balance remaining upon release from incarceration shall be paid at the rate of not less than 10% of defendant's gross monthly income until paid in full and payments shall begin no later than 60 days following release from incarceration. PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT

[ ] After the defendant is release from imprisonment, and within 30 days of the commencement of the term of supervised release, the probation officer shall recommend a revised payment schedule to the Court to

satisfy any unpaid balance of the restitution. The Court will enter an order establishing a schedule of payments.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several (Defendant name, Case Number, Total Amount, Joint and Several Amount and corresponding payee):

[ ] The defendant shall pay the cost of prosecution.
[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest; (4) fine principal; (5) fine interest; (6) community restitution; (7) penalties; and (8) costs, including cost of prosecution and court costs.